IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION STUDENT-ATHLETE CONCUSSION INJURY LITIGATION,	) Docket No. 13 C 9116)) Chicago, Illinois) July 29, 2014) 2:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - STATUS, MOTION
BEFORE THE HONORABLE JOHN Z. LEE

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ALSO PRESENT: HONORABLE GERALDINE SOAT BROWN

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(Proceedings had in open court:)

THE CLERK: 13 C 9116, NCAA Student-Athlete Concussion Injury Litigation, for status and motion hearing.

MR. BERMAN: Good afternoon, your Honor. Steve Berman on behalf of plaintiffs.

MR. SIPRUT: Good afternoon, your Honor. Joe Siprut on behalf of plaintiffs.

MR. EDELSON: Good afternoon, your Honor. Jay Edelson and Ari Scharg on behalf of plaintiff Nichols and the proposed personal injury class.

MR. ZIMMERMAN: Charles Zimmerman, your Honor, on behalf of the plaintiffs.

MR. LEWIS: Richard Lewis on behalf of the plaintiffs, your Honor.

MR. MESTER: Good afternoon, your Honor. Mark Mester and Johanna Spellman on behalf of the NCAA.

THE COURT: Do we have people on the phone?

MR. TROXEL: Good afternoon, your Honor. Jeremy Troxel on behalf of plaintiffs.

THE COURT: Can you talk more slowly and more clearly into the receiver, please.

MR. TROXEL: Jeremy Troxel on behalf of the plaintiffs.

MR. SELMER: James Selmer on behalf of the plaintiffs.

MR. GUDMUNDSON: Brian Gudmundson on behalf of the

plaintiffs.

MR. DUGAN: Good afternoon, your Honor. James Dugan, with the Dugan Law Firm in New Orleans, on behalf of the plaintiffs.

MR. NEWTON: Clark --

MS. PAVA: Good afternoon --

MR. NEWTON: Clarke Newton on behalf of the plaintiffs.

MS. PAVA: Mindy Pava on behalf of the plaintiffs.

THE COURT: How do you spell that last name, please?

MS. PAVA: Pava, P-a-v-a.

THE COURT: Anyone else on the phone?

MR. ELLIS: Yes, Ryan Ellis at the Lanier Law Firm on behalf of plaintiffs.

MR. MILLER: And Rodney Miller on behalf of the plaintiffs.

MR. FRANCO: David Franco on behalf of the plaintiffs.

MS. TOOPS: Lynn Toops on behalf of the plaintiffs.

THE COURT: Anyone else? All right. Good afternoon, everyone.

We are here on status in this case as well as the motion that was filed this morning, of which I got a copy of late yesterday, with regard to seeking the Court's preliminary approval of the settlement.

Before we proceed to the motion for preliminary

approval of the settlement, I did want to address a couple of procedural matters. First of all, with regard to the appointment of lead counsel in this case, the last time we were all together, I told you I'd take a look at all the motions, and if I thought it was appropriate go ahead and issue an order while the parties were pursuing the settlement discussions.

The papers that the parties filed raised some questions in my mind with regard to the motion filed by the Hagens Berman firm on behalf of what Hagens Berman termed the medical monitoring plaintiffs. And I just wanted to get some more clarification with regard to Hagens Berman's position and what exactly it's seeking in its motion for appointment of lead counsel.

And so, Mr. Berman, I am glad you are here.

With regard to the request by Hagens Berman to be appointed as lead counsel, the medical monitoring class, so-called medical monitoring class, is defined by Hagens Berman to include the various plaintiffs of the various cases, including obviously the Arrington case which is the first-filed case that was filed in this court originally. But I just want to be clear.

To the extent that the medical monitoring class as defined by the Hagens Berman firm includes or is defined to include the class or the proposed class that is defined in the Arrington case, that class as defined in the second amended

complaint includes not only a class seeking relief under 23(b)(2), that is medical monitoring, but also a putative class that seeks damages as a result of the alleged negligence on the part of NCAA under 23(b)(3).

And I wanted to be clear because this was an issue that has been discussed in prior statuses between the Hagens Berman firm and Mr. Edelson on behalf of the Nichols plaintiffs, that, Mr. Berman, medical monitoring plaintiffs as defined would include at this point both putative classes, is that correct? That is, the plaintiffs who are asking for injunctive relief as well as plaintiffs at this point in time, as stated in the second amended complaint, that are also seeking damages as a result of the alleged actions or inactions by the NCAA.

MR. BERMAN: Let me see if I can answer to your satisfaction, your Honor.

There -- there are individual plaintiffs who are class representatives, who are seeking damages not as class relief but separate -- their lawsuits will continue to seek damages. We are not seeking in the medical monitoring class or in the injunctive relief class any actual damages for personal injuries.

THE COURT: No, I understand that. But I'm just trying to assess whether you believe that if I were to grant your motion, that it would be part of your responsibilities to

protect and oversee the best interests of the putative class members who are also seeking damages, as alleged in your complaint.

MR. BERMAN: Well, that's an interesting question.

THE COURT: That's why I am asking it.

MR. BERMAN: Because there is a difference of opinion. So right now I am representing and seek to represent in the settlement all NCAA athletes who have ever played. The claims we're seeking to have you approve are medical monitoring and injunctive relief, not damages.

So we think we're acting in their best interest by proposing that settlement and providing in the settlement that they are free to pursue personal injury claims on their own, not on a class basis. And the reason that we came around that way is very simple. We think case law is quite clear, you cannot certify personal injury claims.

I'll give you an example. I have --

THE COURT: Well, I mean, I guess, you know -- I am sure we will get into that later on in this hearing. But my question is really much more of a threshold question, right? I'm trying to ensure that lead counsel in this case are going to act in the best interest of all putative class members with regard to all their claims, right? Maybe it's in their best interest, as you say, to waive the right to proceed, to waive their basically 23(b)(3) rights, to preserve their personal

injury rights individually. And maybe that's in the interest of the entire class, you believe, to do that.

Some people might disagree. But I just want to make sure that when you are proceeding, if you are going to be proceeding as lead counsel, that you are pursuing the best interests of all putative class members with regard to all their claims, and making your decisions in the best interests of that whole -- of the entire putative class.

MR. BERMAN: And I think I have. I think when you look at the settlement -- the settlement, by the way, is -- you see you got a lot of papers, and you haven't had a chance to go through them, I am sure. But we have hired the leading scientist in the country. We have hired the leading statistician in the country. We have gone through this with two retired federal judges who are overseeing this and watched everything I've done and my co-lead counsel have done.

And I think they have concluded that we have acted in the best interest of the class. And I submit to the Court we have.

THE COURT: By the class, you --

MR. BERMAN: I mean everyone, everyone who's got a claim, even if they have a personal injury claim.

THE COURT: All right. Mr. Edelson, I'll provide you with, if you want, a brief response or reaction.

MR. EDELSON: I was actually really interested to hear

what the position was today. I am still not sure I understand.

But from our point of view the class as currently defined is actually -- we -- we were very concerned about what the deal would look like, and it's far worse than what we thought. The class as defined is anyone who's ever been an NCAA athlete. You got bowlers and archerers in there, who I don't know why they have any similar interest.

Also you've got the people who are really injured, the people who this -- when they brought the class action, they told the press in their court papers, the Court, what they really cared about, which was getting and address the people who had suffered injury as a result of concussion. Those people are getting absolutely no benefit at all. The only thing they get is this basically post-lawsuit class action waiver.

THE COURT: No, I mean, I understand that is your position. And it has been consistent throughout. And I appreciate the consistency.

I guess my question, what I am trying to decide on the applications for lead counsel, which is what I am doing now, is, I want to make sure that whoever is leading the charge is keeping everyone's interest in mind.

Now, the decisions that they make on behalf of everyone may or may not be disagreed with or agreed with with the rest of the world. But I want to make sure that that

person or that law firm is considering and considers themselves to be responsible for the entire class. And what I understand -- because it wasn't quite clear in the papers.

So what I understand from Mr. Berman today is that is Hagens Berman's position. Is that right?

MR. BERMAN: It is, your Honor.

And can I just say one more thing in that regard? I'm probably one of the few lawyers in the room that is actually litigating individual concussion cases, filed cases, not just talking about it but litigating. And I can tell you that in each case I have to -- first of all, I have to see who was responsible. Lot of times it's the school, not the NCAA. I have to hire vocational experts. I have to hire concussion experts. I have to hire neuropsychologists. I have to have IMEs done for my clients.

So when I look at what's in the best interest of those clients, based on that experience, in my view it's -- the best thing for them to do is to have a chance at medical monitoring. And if you actually have concussion injury, then you can find a lawyer who's going to do your case on an individual basis and do what needs to be done for that client, rather than try to shoehorn them into some class action which we think would not be certified.

THE COURT: Okay.

MR. SIPRUT: Judge, if I may also put on the record,

the motion seeks the appointment of the Hagens Berman firm and my firm, Siprut P.C., as co-lead counsel, consistent with the original appointment of lead counsel three years ago when this case was first filed and litigated. Our two firms have done all the work to get to this point. And the motion seeks the appointment of those two firms as lead counsel along with the structure that we put together happily by agreement. So sometimes miracles can happen. We worked out something here.

What I want to emphasize to the Court, if I might, is that I take the obligations that your Honor has alluded to and identified incredibly seriously. And I'm extremely cognizant of them and have been throughout this process. And I think my colleague Mr. Berman speaks eloquently about how we have managed those obligations and have achieved what we think is a great result, consistent with those obligations.

So I just want to echo and reiterate that. And hopefully the Court will see fit to accept our application so we can continue on this path.

MR. MESTER: Your Honor, if I may?

THE COURT: Hold on for a second.

So, Mr. Siprut, I am glad you brought it up because I just wanted to make sure that I get this on the record as well.

So you too agree that your obligations to represent your clients in this case, should you be appointed as lead counsel, would include the entire class as defined by the

second amended complaint in Arrington as well as all of the other complaints that were filed as part of this MDL, is that correct?

MR. SIPRUT: That's correct. And furthermore, the settlement that we have proposed to your Honor that we're here for today is, we believe, consistent with the discharge of those duties and obligations.

THE COURT: Yes.

MR. MESTER: Your Honor, there is one provision of the settlement agreement I want to call your attention to that I think may give you some comfort with regard to this issue. Mindful of the issues that Mr. Edelson raised, the settlement agreement, the proposed settlement agreement, specifies that the statute of limitations with respect to those bodily injury claims has been tolled since they were first brought and will be continued to be tolled through the preliminary approval.

So there will be no question with respect to any prejudice for these individuals that -- that you're addressing and the types of claims you're addressing. So that -- that's a portion -- that's an element of the settlement.

THE COURT: Okay. Very well. I will issue a written order to this effect. But with regard to the -- with those clarifications and affirmations, with regard to the motion for appointment as lead counsel in this case, on April 14 I ordered the parties to submit applications to serve as lead and liaison

counsel in connection with this MDL action. The NCAA, the defendant, submitted an unopposed application for designation of lead and liaison counsel requesting Latham & Watkins be appointed as its lead and liaison counsel.

Jay Edelson, counsel for plaintiff Anthony Nichols and those similarly situated, filed a motion to appoint Jay Edelson as lead counsel of the class personal injury claims.

Steve Berman of Hagens Berman submitted a joint agreed application for appointment of lead counsel special class counsel for monitoring relief and executive committee for the medical monitoring plaintiffs on behalf of his firm as well as other firms, including Mr. Siprut's firm. The applications were submitted pursuant to Rule 23(g)(3), which provides the Court may in its discretion designate interim counsel to act on behalf of the putative class before determining whether to certify the action as class action.

All class counsel appointed pursuant to Rule 23(g) have the duty to fairly and adequately represent the interests of the class under Rule 23(g)(4). Where, as here, more than one adequate applicant seeks appointment as counsel, the Court must appoint the applicant best able to represent the interests of the class under Rule 23(g)(2).

First, with regard to the NCAA, it requests that the Court appoint Latham & Watkins. Not only is there no objection to this request, but Latham & Watkins has been representing the

NCAA from the inception of the Arrington case in 2011 and is intimately familiar with the issues involved in this case.

Additionally Latham & Watkins has substantial experience serving as lead and liaison counsel in numerous other class actions of this magnitude. Accordingly the Court grants the NCAA's application and designates Mark Mester of Latham & Watkins as lead counsel for the NCAA, and Johanna Spellman also of Latham & Watkins as its liaison counsel.

Second, the Court notes as a preliminary matter as discussed here today that the term medical monitoring plaintiffs, quote unquote, coined by Hagens Berman in its application is a bit of a misnomer. Hagens' application defines medical monitoring plaintiffs in fact to include all of the plaintiffs in the Arrington case, Caldwell, Doughty, Durocher, Hudson, Morgan, Power, Walton, Johnson and Wolf case.

The second amended complaint in Arrington in turn seeks to certify class pursuant to Rule 23(b)(2) and 23(b)(3) comprised of, and I quote, all current and former NCAA student athletes who experienced one or more head impacts while playing sports in an NCAA school resulting in concussion or concussion-like symptoms, end quote. And that's in the second amended complaint in Arrington, Docket No. 227.

In so doing the Arrington plaintiffs seek not only injunctive relief under Rule 23(b)(2) in the form of medical monitoring, but also monetary damages under Rule 23(b)(3) to

compensate plaintiffs for injuries they have suffered or will suffer in the future.

Similarly, I note that the plaintiffs in the Durocher, Powell and Wolf case also seek certification in the complaint of Rule 23(b)(2) classes and 23(b)(3) classes. As a result the term, medical monitoring plaintiffs, encompasses putative class members who seek both, monetary damages related to alleged injuries as well as injunctive relief.

Realizing the scope of the term, Mr. Edelson does not oppose Hagens Berman's appointment as lead counsel, so long as it is, in his words, limited to medical monitoring claims only, but objects to the extent that Hagens Berman seeks to serve as lead counsel for, quote, class personal injury issues which, according to Mr. Edelson, Hagens Berman has, quote unquote, consistently repudiated.

But in light of the statements here today as well as Hagens Berman's actions in the Arrington case and prior proceedings in this court, the Court disagrees with Mr. Edelson and disagrees that Hagens Berman has, quote unquote, repudiated the personal injury claims at this stage. They certainly have not disclaimed or affirmatively waived the personal injury claims during this proceeding. And for the purposes of the current posture of the case, that is for the Court's appointment of lead class counsel prior to the Court's decision on approval of any settlement or certification of any class if

appropriate, I believe that in light of the fact that the Arrington, Durocher, Powell and Wolf actions all seek classwide relief under both 23(b)(2) and 23(b)(3), and the statements by counsel, I will grant the application by Hagens Berman and appoint Hagens Berman and Mr. Siprut as lead counsel for the class in this case.

I want to be clear, that is not to say that I have approved in any way the settlement the parties have proposed today. But rather until such time the Court does resolve class certification issues in this case, which the Court has not done so to this point, counsel in these actions continue to owe a duty to the entire putative class. And indeed I would note the scope of the putative class in Arrington is substantially identical to the putative class in the Nichols case, who Mr. Edelson represents.

Like Arrington, the Nichols suit seeks to certify Rule 23(b)(2) and (b)(3) classes for medical monitoring and damages and similarly defined putative class as, quote, all current and former NCAA student athletes who sustained a concussion or suffered concussion-like symptoms while playing NCAA-related sports, who incurred medical expenses as a result.

Given this overlap, the Court sees no reason at this time to conclude, as Mr. Edelson argues, that counsel for the Arrington plaintiffs will not be able to represent the interests of an entire class as required by Rule 23(g)(2). To

the extent, of course, that the Nichols plaintiffs have any objections to the settlement that is being proposed, the Nichols plaintiffs may file an objection or be heard by this Court.

Therefore, the Court will designate the firms of Hagens Berman Sobol Shapiro LLP and Siprut PC as co-lead counsel for the proposed class. In so doing the Court notes that Hagens Berman and Siprut have served as co-lead counsel for the Arrington plaintiffs since, as I said inception of this case in 2011, have expended numerous hours in service of the clients, and have moved the case along in a commendable pace.

Furthermore, these firms have substantial class action experience and in serving as lead counsel in other class actions, and have served as counsel in other comparable cases.

Finally the Court notes that there are economies to be gained due to the fact that firms have offices in Chicago, eliminating the necessity of appointing additional local or liaison counsel.

The Arrington plaintiffs' joint application is, therefore, granted as to Hagens Berman and Siprut.

Accordingly, the Court also designates Richard S. Lewis of Hausfeld LLP as special class counsel of monitoring relief. I do so because the Hausfeld firm and Mr. Lewis also have substantial experience in serving as lead counsel in class actions, and he has worked diligently on behalf of his clients

in proceeding before the MDL panel in this court.

Finally the plaintiffs asked the Court to appoint Charles S. Zimmerman of Zimmerman Reed, Mark Zamora of the Orlando Firm PC and James Dugan II of Dugan's Law Firm as members of the executive committee. And the Court notes that Zimmerman, Zamora and Dugan like Lewis have substantial experience as class counsel and have diligently represented clients in the course of this action. Thus, that application is approved as well.

Finally, in so doing, the Court denies the motion by Mr. Edelson, counsel in the Nichols case, to be appointed lead counsel for putative personal injury class at this stage. As set forth above, the Court has already determined that the Hagens Berman, Siprut firms are best situated at this point to represent the interests of the class, class as a whole. Therefore, that motion is denied. But it's denied without prejudice because, as all the parties know, the interaction and the intersection between the 23(b)(2) class and 23(b)(3) class is an issue that is going to be in some ways the heart of the settlement to ensure that the rights of the absent class members are protected.

So that's my ruling with regard to the application.

MR. SIPRUT: Thank you very much, your Honor.

MR. MESTER: Thank you, your Honor.

THE COURT: So having done that, let's move to the

motion for preliminary approval of settlement. Mr. Berman, Mr. Mester, is there a particular agenda that the parties propose for this?

MR. BERMAN: Yes, your Honor. If -- if it's okay with the Court, I though I would just -- since you got a lot of paper, I might go through the settlement for just a few moments, explaining the highlights. And then our agenda is to ask you to preliminarily approve the settlement. We know you're not going to do that today. And that you might either do it without or with a hearing later, that we are at your convenience.

There is a second step to this that we haven't finished. And what we're proposing to do, we think it will take us about 45 days to come up with a notice plan. So we've agreed on the terms. And now we're trying to figure out the notice. And it's a little trickier than normal because what we have to do is to engage a claims administration firm that's actually going to go hire the doctors and come up with protocols to administer the tests if you approve the settlement.

We've been working on that, but we're not just there yet because it's not -- hasn't been done that often.

THE COURT: How are you going to go about -- I am sure that the parties have given this some thought. How are you going to go about trying to identify all the members in the

class and what notice would be reasonable?

MR. BERMAN: That's the other thing we're working on. And we've been working on that. And let me give you -- there is a lot of parts to this answer.

First we've been talking with Jim Messina, President Obama's former campaign manager. And he is very in tune with social networking and using social media. So we are developing a social media plan because a lot of these student athletes are on Facebook and Twitter and all the other things that people my age don't necessarily use.

We're going to combine that with mailed notice. And what we're doing now, and it's going to take a little time -- and Mr. Mester and my group has been working on it for a while -- is, we're actually going to ask the NCAA to send a letter out to its member institutions, asking them for the names and addresses, to the extent they have them, of their student athletes. We think they have them because they keep in touch with them for alumni reasons and fundraising reasons.

We're also -- it turns out there is another case in California that just settled called Keller versus NCAA. I'm lead counsel in that case. It involves student athletes' publicity rights. And they're about to get paid for misuse of their rights. And we're -- we're collecting the names for that settlement. So we actually have a combined effort to -- to reach out to these schools because these schools now have to

respond in two cases.

The letter we're going to send from the NCAA says, if you don't give us the names and addresses, we are going to subpoena you. We're hoping not to have to do that. There is a thousand schools. But if we have to go down that road, we have to go down that road.

So in the next 45 days we're going to be working. And then we're going to come back to you with a proposed notice and distribution plan.

Did I missay anything?

MR. MESTER: No, that's right.

THE COURT: Okay. I would note, by the way, Mr. Berman, as you mentioned, I did just receive this rather impressive stack of papers. And I will say that I did have a chance to read the memorandum. I have reviewed the memorandum in support. But I have not had a chance to review the various attachments and the documents that were provided by the parties as part of this motion.

So I just want to let you know that that's where my review of the motion stands.

MR. BERMAN: Okay.

THE COURT: I also wanted to make sure that I put on the record that I am joined here today by Judge Brown, who has been helping the parties in the discovery that is proceeding in this case and the discovery that took place in the Arrington

case.

So you may proceed.

MR. BERMAN: So I'll be very brief, your Honor, just to go through the highlights so you have them in mind from our perspective. And also, frankly, there is a lot of press people here. And I want to make sure that if the word goes out, which it is, that it goes out correctly.

The settlement really has two aspects. And if you -- I have it on the monitor. But I have a hard copy if I can approach.

THE COURT: You may.

While Mr. Berman goes through the presentation, there is no need for counsel to remain standing here at the podium, if you want to sit down. And then I will see if there is any additional comments people want to add. At that point I will invite you up to the podium.

So please take a seat.

MR. BERMAN: So the injunctive part under Rule 23(b)(3), one of our concerns, and frankly a very serious concern, was that the NCAA was not living up to best practices with respect to concussion management. So the injunctive relief that we sought was to change those practices and require every school to conform to what our experts, Dr. Cantu, says is best practices.

So very briefly, you can see that we identify here

what the problem was and how the settlement changes that problem. And it starts with the very basic that baseline testing, it's imperative that every student athlete before they begin their career has a test to see what their skill level is at a cognitive level, so that if they then are injured, you can measure that and see if they are off their cognitive test. So we start with that.

We also start with probably the second most important idea, your Honor, and that is, you can't return to play in the same day that you've had a concussion. And you have to be cleared by a physician. And what we saw through discovery and what I see in my individual cases for the case I am representing is that they were returned to practice, and they weren't cleared by a physician. And that's really where the danger is. If you're out there before you're healed, too soon, that's how these kids are getting lifetime injuries. So we've taken care of that.

We've also made sure that there are adequate medical personnel at contact sports. And let me pause for a second before I go to the second page.

There has been a lot of emphasis in America on football. This is not a football-only problem. So the settlement covers all contact sports. In fact, it covers all sports, in the event someone was swimming in a pool and they hit their head and want to get tested.

So we want to make sure everyone gets tested. But it's important to note that it's an all-sport event because, for example, I learned through this case that the second leading concussion issue is female soccer, because the female neck is a little different, and concussion is basically a twisting of the head that jiggles the spine and the brain. So when a female soccer player goes up, they tend to twist more. So it's protective of the people who need protection.

We're also making sure that there is a reporting process in place. So the schools have to report concussions in a specified manner. So we have a data set so that the medical science committee can be studying this as it goes forward and monitoring what needs to be done next.

We've amped up concussion education, both of coaches and students, because it's important for students to understand when they may have been concussed so they can go and say, here is what I am experiencing. And that's the injunctive relief which we think is significant. And we think it will have a very protective effect of student athletes going forward.

Medical monitoring. And I'm glad -- you're right we used that word overbroad. And I will not do so in the future.

The medical monitoring program will work this way: First there is a medical science committee that's been established, two nominated by us; two nominated by the NCAA. They cover a wide variety of medical fields. Judge Andersen

will be the chair, if you approve the settlement, of the medical science committee, to make sure that it's working properly and that if there is any impasses he can use his well-known mediation skills to get through those.

They will develop a questionnaire. And the questionnaire will be designed to test. There is all kinds of tests that you can get on paper to figure out if people may be having injuries caused by concussions. That questionnaire will be put on a website. Any class member can fill it out. It will be screened and judged by criteria to be developed by the medical science committee. And if they qualify, they then will be available for two types of testing, either a post-concussion syndrome testing or a testing for CTE, a more severe form of brain injury.

So if they qualify, they go to a test center. They get -- the test results will come out, will tell them whether they have a concussion-related injury and what treatment options are available going forward. Because if you find out the cause of your injury, you can do something about it. And so hopefully that will happen.

It will cover any athlete who's ever played can make an application for medical monitoring. And it will go forward for 50 years, so that the kids playing now or the kids who are -- you know, just got done playing will be covered by this, because the later-life diseases tend to happen around age 35 to

50. And then they tail off after that.

The final aspect of the settlement is a $5 million research fund. And the research is going to be focused on how to prevent concussions. When we've talked about it, I think in a few years, maybe three or four years, through research that we're funding here and is being studied elsewhere, that plaintiffs will actually have devices on their heads in all sports. And we will measure the g-forces. And when they reach a certain level, a light will go off in the box and they have to come out.

So that's the kind of thing we hope this research fund will develop to prevent future concussions. And that is kind of the summary of the settlement. And I'm able to take any questions that you have, your Honor, at this point.

HONORABLE JUDGE BROWN: I presume you have some kind of succession plan for medical monitoring committee?

MR. BERMAN: Yes, it's a -- it's a five-year appointment. There are staggered appointments for the members. Judge Anderson is willing to do the first five years, and then we have to reexamine it after that. There will have to be a succession appointment for me too because I won't be around when this program ends. So we have a deal with someone else.

THE COURT: With regard to the settlement contemplates I believe it's $70 million --

MR. BERMAN: That's correct.

THE COURT: -- set aside for that. And again, this may be in your supporting materials. I believe there is a declaration by a physician in here. But how was that amount arrived at?

MR. BERMAN: It was through our analysis of how much may be necessary, how many tests might be out there, how much those tests costs. So you'll see in the report of Mr. Bruce Deal, it's Exhibit 8, I think, to the papers we gave you -- is that the right number? Exhibit 8.

What we did, your Honor, was something we think very thorough. We hired Dr. Cantu, Mr. Deal who is an economist with a well-known statistician background. We hired an expert, a Ph.D. in healthcare matters. We hired an epidemiologist and a health economist. And we hired an actuary. So we had five different disciplines look at how many people will even be alive who are within the class of 30 years. What is the incident of concussion rates in various sports. How many class members there are.

So basically we know there is roughly 4.2 million class members. 700,000 of them played football. 1.1 million were in other contact sports. And 2 million were in non-contact sports.

We then can take the concussion rates in the football and other sports and multiply them out over time. And then we know the medical literature on how many unresolved PCS cases

there are over time, and how many CT cases there might be. And we're able to have a range of a high-low of how many tests are going to be done and what they cost.

We've actually gone out and got very thorough cost estimates from a firm that's doing similar testing in the BP, British Petroleum, settlement and in the NFL settlement. So we think we came up with this estimate, got some real hard number. Lot of homework went into this, was kind of -- kind of fun actually.

THE COURT: Okay. And so assuming that the settlement is eventually approved, this is what the class is receiving. As part of the settlement, what is the class giving up?

MR. BERMAN: The class is only giving up one thing, and that's the right to sue for medical monitoring relief. That's it.

THE COURT: What about there is some mention in the papers about the class waiving their right to proceed under 23(b)(3) to pursue their individual class claims on a classwide basis? Is that part of the settlement as well?

MR. BERMAN: I'm sorry, can you say that --

THE COURT: Is that part of the settlement as well; that is, is the class agreeing to waive it's rights to proceed under 23(b)(3) or at least try to proceed under 23(b)(3) with regard to their personal injury claims?

MR. BERMAN: That's correct. And the reason for that

was, we've already gone on to that a little bit. But the other reason was, we couldn't get funding because the insurance companies in the NCAA are not going to put up $70 million and then turn around the next day and have a new class action on personal injuries. So that was a tradeoff that we thought was in the best interest of the class.

THE COURT: But each individual class member has the right and retains the right to pursue their full extent of their individual injury claims, is that correct?

MR. BERMAN: That's correct. In fact, I am pursuing them for some clients. I have new clients who are going to stay in the settlement. But they are also going to bring their personal injury claims. And I think there will be more personal injury claims when the news of this gets out, frankly.

HONORABLE JUDGE BROWN: So they will be giving up that right under not just Federal Rules of Civil Procedure but any state comparable --

MR. BERMAN: That's right.

HONORABLE JUDGE BROWN: -- action proceeding?

MR. BERMAN: That's right. Just the right to bring personal injury class action, not the right to bring a case.

HONORABLE JUDGE BROWN: But under any state class action mechanism as well.

MR. BERMAN: That's correct, your Honor. But again, I know of no case, and we get into the briefing, that allows

under Amchem or other Supreme Court precedent a personal injury class action.

THE COURT: Well, I mean --

MR. BERMAN: That's just not done.

THE COURT: I understand that's your position. I am sure that there is people out there, Mr. Edelson being one, that may disagree with that position. And that kind of cuts both ways, right? Because if the parties are so sure that a 23(b) class will not be certified, why is it part of the settlement at all, right?

Mr. Mester I see is waiting to get up. Please.

MR. MESTER: Your Honor, quite simply, it's the cost of the defense, disruption of litigation. We know if we don't resolve the class claims, that there will be an incentive for other class action lawyers to file other class actions.

And so a substantial benefit to this settlement is that we eliminate that risk once and for all. But Mr. Berman is exactly right. Individual class members retain the right to pursue individual claims. As I mentioned earlier, not only that, but we made clear in the settlement that the tolling -- the statute of limitations are all tolled. So there will be no prejudice whatsoever based upon the pendency of this class case.

But in terms of limiting class exposure, it's really a cost of defense because it's enormously expensive to litigate

these cases.

MR. BERMAN: There is -- in terms of what class members are receiving who may want to bring personal injury claims, they are receiving the play book. What I mean by that is, one of the things we wanted to do if we kept going was, we were going to ask you to issue certify the issues of whether the NCAA breached their duty and whether they had a duty. Two big legal issues.

In our class certification paper and our proffer, we've given any person who wants to bring a personal injury claim against NCAA the play book. They don't need to do any further work. All the documents are identified. All the hot stuff that we gathered over three years is right there. And, in fact, I know that there are lawyers in the country who have taken that work product, put it in their complaints, and are proceeding with individual personal injury claims. That was one of our objectives in representing the class. Everyone's interest was to make that play book available to facilitate future personal injury claims.

THE COURT: Okay. At this point in time I will allow any of the other plaintiffs' counsel to make statements or present any arguments or reactions to the class.

MR. LEWIS: Thank you, your Honor. Richard Lewis.

I just wanted to reference an earlier appearance that I made before this Court on behalf of the Walker plaintiffs,

regarding our concerns with the medical monitoring negotiations. Our two basic concerns at the time were to make sure that the older football players were fully covered in the medical monitoring program. And the particular types of cognitive and behavioral problems they're experiencing in mid to late life were covered by the monitoring program. And our second concern was that it reach all 50 states.

You asked that I on behalf of the Walker plaintiffs confer with Hagens Berman in trying to find a way to work together, and we have done that. And I've been able to work with them and with the NCAA in the mediation, and with the assistance of our experts who were focused on the long-term hazards to the mid to late life hazards of subconcussive impacts.

So I appreciate the Court encouraging us to do that. And we were able to do that and in the settlement provisions reflect that cooperative work. Thank you, your Honor.

THE COURT: Anyone else? Mr. Edelson?

MR. EDELSON: Thank you, your Honor.

Your Honor, along with I am sure members of the press, perhaps the Court, we're still digesting the settlement. We didn't get the normal three-day notice period. We've gotten a bunch of briefs and papers this morning. I've been looking at it.

I'd like to make a couple brief comments. But we

really would think that the Court might benefit from a written brief by us where we can lay out our objections. And I think if we have a chance to study some of the issues, we're seeing a little bit more closely, either they'll be cleared up or we can make the points perhaps a bit more eloquently. So we ask that we can submit a brief.

That being said, as we understand the settlement, it is going to benefit no one here in any real way other than the NCAA and the plaintiffs' attorneys. We've got a procedure. First the idea that it's a $70 million settlement is not true. It's not. This is a $70 million price tag around what is -- you couldn't even call it a claims-made settlement.

Under the deal the NCAA puts $25 million in a pot. That amount is going to be paid to the attorneys, 15 million. I think if I understood it correctly, 5 million for notice, and then $5 million more for basically the reimbursement of co-pays, as I understand it, for the testing. We'll get there in a minute.

Then if by any chance the $5 million is eaten up, that money might go back in at some later point. But the idea that there really is $70 million going out, we have no basis for that at all. This is exactly what the Seventh Circuit just looked at in a recent case, saying, you know, we got to be really careful when we got claims-made deals in saying what the ceiling is and pretending that that's what's actually going to

be paid out.

Now let's look at what -- what actual members of the class are going to -- if they are going to care about the settlement. We've got 4 million people. Most of the people weren't involved in -- in high impact sports at all. You got the archerers, you got the bowlers, you got the runners. Somehow they are mixed up in the settlement. They're going to get nothing from it at all.

Then you got people who actually were involved in high impact sports. And people we care the most about ought to be the people who were injured. Those people have already got a test. All the clients that Mr. Berman was talking about have undergone tests and have medical treatment. And that's what they are suing about.

So the fact -- I don't know how he goes to his clients and says, this is a good deal. What you've won in this deal is a chance to get another test. No benefit at all.

The injunctive relief, we've heard that the NCAA had to correct Mr. Berman last time when they took credit for a lot of what the NCAA apparently was doing on its own. But whether that's a good social good or not, and I believe it is, that doesn't actually benefit people who are no longer NCAA student athletes, which is most of the class. So we might think that's a good thing, but there's no direct benefit.

So how about -- how about the people who were injured,

who suffer real damages? They get -- they get this kind of fake relief of you can -- you can fill out a questionnaire, and then there is a secret algorithm. And if the panel decides that you fit, you can get a test that you don't want.

And what do they lose? They lose the right to participate in a class action. Mr. Berman should talk to Mr. Siprut about what the chances are of getting a personal injury class certified. At the beginning of this case, what they said to the press was, of course you can get a class action certified. Even when they moved for certification on a more limited basis, Mr. Siprut said to the press, don't worry, we're going to move for the damage class later on.

Now when the NCAA cleverly makes them trade, he says, which clients do you care more about? The few people who maybe haven't been tested yet or the people who are really injured? You've got -- you've got a choice to make.

They say, well, it's in the best interest of the class to now pretend you can ever get a personal injury class certified. It's not true. We cited cases post Amchem. You look at the NFL deal. That NFL deal, the NFL wasn't simply worried about the litigation costs when they put up three quarters of a billion dollars. Personal injury class action has a significant amount of value.

Now, what's going to -- what's the harm? As Mr. Berman says, these people can bring their own individual cases.

And he actually went for, I think, he, hidden understanding, is arguing against his own interest to explain how hard it is. You've got to get experts. You've got to find attorneys, all that.

And the big problem, your Honor, is that most of the class, the personal injury claims are worth five figures, not -- not six figures, not seven figures. And so taking the client who has a claim where they might be able to get $20,000, $10,000, $8,000, and saying, go find a personal injury attorney who's going to bring this, they can't.

What the -- what the NCAA will get out of this deal is the elimination of billions of dollars of liability. There will not be personal injury claims brought by 95 percent of the class. They will never pay them. They will be gone like that. And they are doing it for $15 million in fees and some secret algorithm.

That's our argument.

THE COURT: So let me just cut to the chase then, Mr. Edelson. Would you have objections to the settlement if the plaintiffs were not waiving their 23(b)(3) rights to proceed on a classwide basis as to personal injury claims?

MR. EDELSON: I would have an objection as a human but not as an attorney. I wouldn't care. I mean, I think it's still a bad settlement and silly. But -- but it really isn't my concern.

THE COURT: Well, I mean, it would be your concern to the extent that you are representing the Nichols class. And as part of the Nichols class, some of the things they are seeking include medical monitoring, right? Would you file an objection on behalf of your clients, the Nichols and the putative class members in that class, with regard to the current form of the settlement if they were not waiving or releasing their right to proceed under 23(b)(3)?

MR. EDELSON: My view would be that they -- they gain nothing from settlement but they lose nothing from the settlement. So it's still a bad settlement. But we would not be objecting, which we told the Court from the beginning.

THE COURT: Thank you.

Mr. Berman, Mr. Mester, I'll provide you with an opportunity to respond, if you like. One or both.

MR. BERMAN: Just briefly, on this last point that there is small claims out there that aren't going to be brought because of the elimination of the ability to bring a class action. He says they're -- they're small claims, five figures. All of a sudden he says, billions of dollars are lost. That doesn't add up. You can't have billions of dollars if there is these tiny claims that are out there.

But what he doesn't answer is, let's say that you have a claim again of someone who's got five or $10,000. How would you prove on a classwide basis that the NCAA breached a duty to

each of those people and caused the injury? Because in any of these concussion cases, you've got to examine on an individual basis the sequence of events for each kid.

Did a doctor see that kid? Was he then returned to practice without the doctor's approval? Did a doctor not see the kid? Did the kid report the concussion? Did he in fact have a concussion? How do you prove any of those things on a classwide basis? It can't be done.

So the notion that we're giving up a right that's valuable is just a fiction. It doesn't stand up if you really analyze how you prove a case. I don't think he has a case on file. I don't think he's litigating an individual concussion case. I am. I know that you can't just do it a recipe for everyone.

If you could, let me ask you this: Why wouldn't I have gone for it? I like big-ticket cases. I've done a lot of big-ticket cases. If I could have expanded this into a billion dollar NFL case, I would have.

And the NFL analogy is really not apt for two reasons. In the NFL case, you have 4500 personal injury cases pending before Judge Brody in the MDL. So obviously there was a mass of people that you can work with. And maybe it made sense for the NCAA in that kind of case to forget about all the issues that I just raised for you that a plaintiff would have to prove, just to buy peace for public relations purposes.

In this case -- there are very few cases out there. There were how many out there? Maybe a dozen in the whole country? Maybe two dozen individual cases. There is not a groundswell to suggest that there is even a need for a class action like there is in the NFL case.

So those two, the NFL analogy really doesn't help us here. He says the injunctive relief is of no value. Well, some of our class representatives are current players. Why would it not be valuable for them to have the NCAA implement the best practices that we think this settlement is implementing?

We just put up the chart of all the changes. Mr. Mester didn't get up and say I'm wrong. These changes aren't being made. They are being made.

And finally, the law recognizes the value of medical monitoring. Mr. Edelson seems to think that doesn't mean anything. But in the NFL case there is medical monitoring. In the BP case there is medical monitoring. The law recognizes a value in people going and finding out from a qualified physician, from a test that's on point, that most people don't even know exist until they get this notice.

The law has found value in that. And that's what this settlement accomplishes, your Honor.

THE COURT: Thank you.

MR. MESTER: Just briefly, your Honor. In terms of

Mr. Berman's PowerPoint and some of the things Mr. Edelson said, and as probably expected, we do disagree with some of the characterizations of the discovery. We disagree with some of the characterization what the NCAA -- NCAA did or did not do. But the point of the settlement is to get past those disagreements and to get this litigation resolved.

We certainly don't oppose preliminary approval, and we firmly believe that this settlement agreement and the relief that's provided to the class is a very positive step forward for the class and for -- as a whole and for the NCAA.

THE COURT: Okay. You may be seated.

Mr. Berman, Mr. Mester, one of the issues that I raised at a prior hearing was whether or not a class that is certified under 23(b)(2) can waive a right in a bundle of rights that a class may have under 23(b)(3). Put it that way, it does present a bit of a metaphysical question. But in fact it's a real one here in that in order for a settlement to be approved at the final stage, the Court needs to find a class certification is appropriate under one of the provisions under Rule 23.

Here the parties are asking the Court to certify a settlement class under 23(b)(2). As part of that settlement the parties are asking the Court to define the settlement so that the class would, unless they opt out, waive the rights to proceed to seek their damages for personal injury under

23(b)(3) on a classwide basis.

To be frank, one of the first things I did when I got this memo was to go through to see if I can find some cases that would help me in that analysis. And I recognize that you got a lot to put into this memorandum. And under the local rules you had 15 pages to do it. You asked for 25 pages. That motion is granted. But still I recognize that 25 pages is not all that much space to address all the issues that you wanted to address.

But I am particularly interested in this issue because I do think that it's something that I am going to have to address in my deliberations as I consider whether or not I am going to approve this settlement.

Yes, you wanted to say something?

MR. MESTER: Your Honor, I think there are a couple decisions. One that comes to mind, which modestly post-dates the 1991 amendments of Title VII, was a Seventh Circuit decision Lemon. And I -- I attempted to refer to it earlier at the earlier hearing when I think I referred to this issue as being somewhat thorny.

But as I understand it, your Honor, there is good press, Lemon being one, and I think there are other subsequent decisions, that allow for a hybrid settlement that has elements of (b)(2) and elements of (b)(3). I think it was certainly always our intention -- I don't want to speak for Mr. Berman,

but I believe it was his as well -- that this would be in that sense a hybrid settlement. It would have elements of (b)(2) but also elements of (b)(3), including but not limited to enhanced notice rights, which would otherwise not be provided under (b)(2). And equally, if not more important, opt-out rights, which would not be provided under (b)(2) but available under (b)(3).

So I think my belief and my understanding is that this settlement combines elements of both.

THE COURT: Okay.

MR. BERMAN: That's correct, your Honor. We are moving under (b)(2) and (d)(1), which we believe allows you discretion to make this a hybrid settlement, and to send notice and opt-out rights. And because of the waiver issues and the opt-out issues, it's exactly why we want you to do that.

THE COURT: No, I understand. And again, I didn't have much time to digest all of the memorandum. And so I didn't have a chance to go back and look at all the cases that were cited. But I did look at a couple of those cases. And it seems that in some of those cases, you had a 23(b)(2) class. And for a variety of reasons the Court decided that additional protections would be appropriate.

But in those cases, at least in my cursory review of them, I did not see the class giving up any additional rights other than what they would give up under 23(b)(2); that is,

they weren't giving up anything that would implicate 23(b)(3). And so that's really the issue that I want the parties to address. And I feel that I am going to give you a chance to do that.

So I'd like the parties -- I would like the parties who are proposing the preliminary approval of this settlement to file a supplemental memorandum addressing the issue; that is, addressing basically whether under 23(b)(2) class with or without -- with or without additional protections, whether such a class can waive the right to proceed under 23(b)(3).

I will give you up to the 15 pages to do so, if you need them all. How much time would you like to submit that memorandum?

MR. BERMAN: Would seven days be okay?

THE COURT: That would be more than adequate. So why don't I give you until August 8, that is next Friday, to file the memorandum. Again, it will be limited to 15 pages, addressing that issue.

Now, Mr. Edelson you had requested some time to file a formal written response and/or objections to the settlement that's proposed in the motion. How much time would you like to file that?

MR. EDELSON: Can we have 28 days?

THE COURT: That will be fine, because I also want you to respond to, if you wish to do so and think appropriate, to

their memorandum they are going to file on the 8th with regard to the 23(b)(3), 23(b)(3) issue.

MR. EDELSON: Of course, your Honor.

THE COURT: So I will give you until August 22 to file your response. In light of the fact that you will be addressing that issue as well as the other aspects of the settlement, I will give you up to 30 pages. You need not use them all. But I anticipate you might need more than 15. So I will give you up to 30.

MR. EDELSON: I appreciate that, your Honor.

THE COURT: So what I would like to do at this point is, I am not going to rule on the motion today. As Mr. Berman alluded, I just received it. I found the hearing today to be quite illuminating. I look forward to the supplemental memorandum that will be submitted in support.

I am also reluctant, I must say, to preliminarily approve a class settlement without knowing what the notice efforts are going to be like. And I understand that the parties need about 45 days to put together a notice plan.

As the parties know, ascertainability, the Seventh Circuit has found, is a requirement. Whether one thinks it's in the statute or implied, either way it's a requirement. And so whether or not you can readily ascertain the identity of all the putative class members in some objective manner is something that I want to consider prior to providing

preliminary approval of the settlement, to make sure that the requirements under 23(b)(2) and/or (3) or (d)(1), depending are all satisfied. Okay?

So with regard to that, Mr. Berman, you said that the parties need about 45 days to get that together. Do you anticipate being able to file a memorandum that addresses the issue of ascertainability and reasonable notice in about 45 days?

MR. BERMAN: Yes, I think, your Honor.

MR. MESTER: Yes.

THE COURT: Okay. Why don't you go ahead and file that by September 5. So that would be with regard to ascertainability with regard to the protocol that the parties intend to use to provide reasonable notice under 23(d).

Since I have everyone here, what I'd like to do is, I'd like to set another -- continue the motion to another hearing date. Once we have had a chance to look at all of the exhibits to the motion, if I find that I require additional either testimony or elaboration with regard to some of these issues, I will issue a minute order asking the parties to address them. Okay?

So let's set this case for further status and the continuation with regard to the motion. Let's set that for September 12. Does that --

MR. BERMAN: We have my firm retreat that day, your

Honor. I am sure everyone will be thrilled if I was not at the conference.

THE COURT: I am sure you will be missed.

So let's set this then for how about the 19th, the following Friday? Does that work for everyone?

MR. MESTER: That's fine.

THE COURT: Okay. Let's set it for 10:00 o'clock that morning. And the motion for preliminary approval of class settlement and certification of settlement class will be entered and continued to that date.

Is there anything else we need to address today?

MR. BERMAN: Not from the plaintiffs.

MR. MESTER: No, your Honor.

THE COURT: Very well. We are adjourned.

(Which were all the proceedings had at the hearing of the within cause on the day and date hereof.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

/s/Alexandra Roth _____ 7/30/2014

Official Court Reporter
U.S. District Court
Northern District of Illinois
Eastern Division

Date